No. 85-1772

FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, by and through its
DIVISION OF STATE LANDS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

STEVEN A. HERMAN
JACQUES B. GELIN
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether title to the bed of Utah Lake (a navigable body of water), which was reserved as a reservoir site by the Sundry Appropriations Act of 1888 and was retained in reservation status by the Sundry Appropriations Act of 1890, subsequently passed to the State of Utah under the equal footing doctrine upon Utah's admission to the Union in 1896.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	1
Statement	2
Summary of argument	7
Argument:	
I. The pre-statehood reservation by the United States of unappropriated public lands underlying a navigable body of water for a particular federal purpose prevents ownership of those lands from passing to a new state under the equal footing doctrine	10
II. The bed of Utah Lake did not pass to the State under the equal footing doctrine because Congress, in the Sundry Appropriations Acts of 1888 and 1890, reserved the bed "as the property of the United States" for use as a reservoir site	20
A. The administrative selection of Utah Lake as a reservoir site specifically included the bed of the Lake	21
B. By virtue of its selection by the Geological Survey as a reservoir site, the bed of Utah Lake was automatically reserved by the 1888 Act	23
1. The reservation under the 1888 Act occurred by operation of law; it was not an administrative withdrawal	23
2. The 1888 Act plainly authorized the selection of the bed of Utah Lake as a reservoir site	25
a. The statutory text	25
b. Background and legislative history	26
c. Contemporaneous administrative construction	27

Argument—Continued: Page

C. Congress ratified the selection of the bed of Utah Lake as a reservoir site in 1890 and retained it in reserved status 29

D. Congress again declined to disturb the reservation of Utah Lake in 1891 and 1897, when it amended the 1888 and 1890 Acts.... 32

E. Petitioner's contention that the background of the 1888 Act supports an implied exclusion of the bed of Utah Lake is without merit 34

III. The reservation of the bed of Utah Lake by the 1888 and 1890 Acts for use as a reservoir site was in furtherance of appropriate public purposes and therefore defeats the State's claim of title under the Equal Footing Doctrine.. 44

Conclusion 51

Appendix A 1a

Appendix B 3a

TABLE OF AUTHORITIES

Cases:

Alabama v. *Texas*, 347 U.S. 272 (1954) 44
Alaska Pacific Fisheries v. *United States*, 248 U.S. 78 (1918) 16, 38, 47
Aluminum Co. of America v. *Central Lincoln People's Utility District*, 467 U.S. 380 (1984).... 27
Andrus v. *Utah*, 446 U.S. 500 (1980) 19
Appelby v. *City of New York*, 271 U.S. 364 (1926) 46
Barber v. *Harvey*, 181 U.S. 481 (1901) 36
Block v. *North Dakota*, 461 U.S. 273 (1983)..4, 14, 37, 48
Blodgett v. *Holden*, 275 U.S. 142 (1927) 44
Borax, Ltd. v. *Los Angeles*, 296 U.S. 10 (1935).... 36
Brewer-Elliott Oil & Gas Co. v. *United States*, 260 U.S. 77 (1922) 12, 45, 46

Cases—Continued: Page

California v. *United States*, 438 U.S. 645 (1978).. 27, 31, 33, 34, 40
CFTC v. *Schor*, No. 85-621 (July 7, 1986) 27, 32
Choctaw Nation v. *Oklahoma*, 397 U.S. 620 (1970) 12, 16, 36, 37, 45, 46
Colomokas Gold Mining Co., 28 Pub. Lands Dec. 172 (1899) 31
Consumer Product Safety Commission v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 26
Coyle v. *Smith*, 221 U.S. 559 (1911) 10
Escondido Mutual Water Co. v. *LaJolla Band of Mission Indians*, 466 U.S. 765 (1984) 26
FDIC v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986) 31
Goodtitle v. *Kibbe*, 50 U.S. (9 How.) 471 (1850).. 12
Hawaii Housing Authority v. *Midkiff*, 467 U.S. 229 (1984) 48
Hynes v. *Grimes Packing Co.*, 337 U.S. 116 (1949) 36, 38
Ide v. *United States*, 263 U.S. 497 ..... 31, 42
Illinois Central R.R. v. *Illinois*, 146 U.S. 387 (1892) 11, 38, 46
Jefferson County Pharmaceutical Ass'n v. *Abbott Laboratories*, 460 U.S. 150 (1983) 37
John Gabthuler, 15 Pub. Lands Dec. 416 (1892).... 31
Kleppe v. *New Mexico*, 426 U.S. 529 (1976)..... 18, 45
Kohl v. *United States*, 91 U.S. 367 (1875) 14
Light v. *United States*, 220 U.S. 523 (1911)..... 45
Mann v. *Tacoma Land Co.*, 153 U.S. 273 (1894).. 36
Marsh v. *Utah*, 740 F.2d 799 (10th Cir. 1984).... 40
Martin v. *Waddell*, 41 U.S. (16 Pet.) 367 (1842).. 11, 23
Massachusetts v. *Mellon*, 262 U.S. 447 (1923)..... 18
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 10, 49, 50
Merrill Lynch, Pierce, Fenner & Smith v. *Curran*, 456 U.S. 353 (1982) 31
Miller v. *Youakim*, 440 U.S. 125 (1979) 29
Missouri v. *Holland*, 252 U.S. 416 (1920) 18
Montana v. *United States*, 450 U.S. 544 (1981)....*passim*
Nevada v. *United States*, 463 U.S. 110 (1983).... 13
Newhall v. *Sanger*, 92 U.S. 761 (1875) 36

Cases—Continued: Page

North Haven Board of Education v. *Bell*, 456 U.S. 512 (1982) 27
Packer v. *Bird*, 137 U.S. 661 (1891) 5, 23
Pollard's Lessee v. *Hagan*, 44 U.S. (3 How.) 212 (1845) 11, 12, 15
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 32
Shivley v. *Bowlby*, 152 U.S. 1 (1894) ..... *passim*
Stearns v. *Minnesota*, 179 U.S. 223 (1900) 10
Summa Corp. v. *California ex rel. Lands Comm'n*, 466 U.S. 198 (1984) 13
Udall v. *Tallman*, 380 U.S. 1 (1965) 19, 27
United States v. *Alaska*, 423 F.2d 764 (9th Cir.), cert. denied, 400 U.S. 967 (1970) 9, 19, 43
United States v. *American Trucking Ass'n*, 310 U.S. 534 (1940) 29
United States v. *California*, 436 U.S. 32 (1978) 20
United States v. *Anchorage*, 437 F.2d 1081 (9th Cir. 1971) 6, 19-20
United States v. *Dann*, 470 U.S. 39 (1985) 15
United States v. *50 Acres of Land*, 469 U.S. 24 (1984) 14
United States v. *Fitzgerald*, 40 U.S. (15 Pet.) 407 (1841) 15
United States v. *Gettysburg Electric Ry.*, 160 U.S. 668 (1896) 48
United States v. *Gratiot*, 39 U.S. (14 Pet.) 526 (1840) 44
United States v. *Holt State Bank*, 270 U.S. 49 (1926) 5, 17, 46
United States v. *Midwest Oil Co.*, 236 U.S. 459 (1915) 44
United States v. *Morrison*, 240 U.S. 192 (1916) 15
United States v. *Mottaz*, No. 85-546 (June 11, 1986) 4
United States v. *Oregon*, 296 U.S. 1 (1935) 11, 18
United States v. *Price*, 383 U.S. 787 (1966) 27
United States v. *San Francisco*, 310 U.S. 16 (1940) 45
United States v. *State of Alaska*, 423 F.2d 764 (9th Cir.), cert. denied, 400 U.S. 967 (1970) 6, 19, 43

Cases—Continued: Page

United States v. *Texas*, 339 U.S. 707 (1950) 10
United States v. *Virginia Electric Co.*, 365 U.S. 624 (1961) 39
United States v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984) 37
United States v. *Wyoming*, 331 U.S. 440 (1947) 19
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 18, 45
W.D. Harrigan, 29 Pub. Lands Dec. 153 (1899) 31
Walters v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985) 44
Western & Southern Life Ins. Co. v. *State Bd. of Equalization*, 451 U.S. 648 (1981) 48-49
Wilcox v. *Jackson*, 38 U.S. 498 (1839) 15

Constitution and statutes:

U.S. Const.:
Art. I 13, 15
§ 8, Cl. 18 (Necessary and Proper Clause) 14, 49
Art. IV, § 3, Cl. 2 (Property Clause) 7, 13, 15, 16, 44, 46
Art. VI, Cl. 2 (Supremacy Clause) 16, 19
Amend. V 9, 48
Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095 *et seq.* 32
§ 1, 26 Stat. 1095 33
§ 2, 26 Stat. 1096 33
§ 4, 26 Stat. 1097 33
§§ 18-21, 26 Stat. 1101-1102 33
Act of Feb. 28, 1891, ch. 384, 26 Stat. 196 15
Act of Feb. 26, 1897, ch. 535, 29 Stat. 599, 43 U.S.C. 665 ..... 33, 34
Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a) 90 Stat. 2792 ..... 1a
Jt. Res. No. 7, 25 Stat. 618 28
Quiet Title Act:
28 U.S.C. 1346(f) 4
28 U.S.C. 2409a 4
28 U.S.C. 2409a(f) 4

Constitution and statutes—Continued: Page

Reclamation Act of 1902, 32 Stat. 388 *et seq.* 40
Submerged Lands Act of 1953, 43 U.S.C. 1301-1303 ..... 2, 20
Sundry Appropriations Act of 1888, ch. 1069, 25 Stat. 505 *et seq.* 1, 2, 1a
25 Stat. 526 ..... *passim*
25 Stat. 527 ..... *passim*
Sundry Appropriations Act of Aug. 30, 1890, ch. 837, 26 Stat. 371 *et seq.* 1, 2, 2a
26 Stat. 391 ..... *passim*
Utah Enabling Act, ch. 138, 28 Stat. 107 *et seq.*:
§ 6, 28 Stat. 109 ..... 18, 19, 43
§ 20, 28 Stat. 112 42
16 U.S.C. 3102(1) 36
16 U.S.C. 3102(2) 36
16 U.S.C. 3102(3) 36
43 U.S.C. 1702(e) 36

Miscellaneous:

19 Cong. Rec. (1888):
p. 1766 28
pp. 2428-2429 28
pp. 7012-7032 24
pp. 7017-7018 41
p. 7020 41
p. 7027 41
pp. 7031-7032 24
p. 7360 24
pp. 7681-7682 24
pp. 7964-7965 24
p. 8200 24
pp. 8200-8202 24
p. 8202 24
p. 8400 24
p. 8461 41
p. 8462 29
p. 8471 41
pp. 8471-8473 41
pp. 8474-8475 41

Miscellaneous—Continued: Page

p. 8476 41
p. 8505 24
p. 8507 24
p. 8510 41
p. 8535 24
pp. 8542-8543 24
p. 8809 24
pp. 8898-8899 24
p. 8980 24
p. 9012 24
21 Cong. Rec. (1889):
p. 27 29
p. 29 29
21 Cong. Rec. (1890):
p. 6048 32
pp. 6045-6059 30
p. 6050 32
p. 6052 32
p. 6053 32
p. 6054 32
p. 6055 32
p. 7087 29
pp. 7269-7291 30
pp. 7319-7333 30
pp. 7341-7361 30
pp. 7393-7417 30
pp. 7722-7729 30
pp. 7765-7782 30
p. 7780 31
pp. 7875-7879 30
pp. 7928-7936 30
pp. 7978-7989 30
pp. 8275-8280 30
pp. 8323-8332 30
pp. 8426-8427 30
pp. 9137-9140 30
pp. 9145-9157 30
p. 9150 25
p. 9156 25

Miscellaneous—Continued:	Page
29 Cong. Rec. (1897):	
p. 1847	34
p. 1948	33
p. 1950	34
p. 1952	34
P. Gates, *History of Public Land Law Development* (1968)	28, 31, 33, 34, 40
1 C. Kinney, *Law of Irrigation* (2d ed. 1912)	15
IX Murray's *New English Dictionary* (1897)	49
19 Op. Att'y Gen. (1890):	
p. 564	25
p. 566	25
IX *Oxford English Dictionary* (1933 ed.)	21
Report on the Lands of the Arid Region of the United States, with a More Detailed Account of the Lands of Utah, H.R. Exec. Doc. 73, 45th Cong., 2d Sess. (1878)	28
S. Exec. Doc. 199, 51st Cong., 1st Sess. (1890)	30
S. Rep. 928, 51st Cong., 1st Sess. (1890)	30, 38, 39
United States Geological Survey, Tenth Annual Report, 4 H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 1st Sess. (1890)	3, 21, 28, 29
United States Geological Survey, Eleventh Annual Report, 4 H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 2d Sess. (1890)	4, 22, 29, 30, 39
United States Geological Survey, Eleventh Annual Report, 4 H.R. Exec. Doc. 1 (Pt. 5), 52d Cong., 1st Sess. (1892)	4, 22, 39, 3a
Webster's Third New International Dictionary (1976)	21

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1772

STATE OF UTAH, by and through its
DIVISION OF STATE LANDS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 780 F.2d 1515. The opinion of the district court (Pet. App. 28a-41a) is reported at 624 F.Supp. 622.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985 (J.A. 41). On March 12, 1986, Justice White extended the time within which to file a petition for a writ of certiorari to and including April 25, 1986, and the petition was filed on April 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Sundry Appropriations Act of October 2, 1888, ch. 1069, 25 Stat. 505 *et seq.*, and the Sundry Appropriations Act of August 30, 1890, ch. 837, 26 Stat. 371 *et seq.*, are reproduced in relevant part at App., *infra*, 1a-2a.

STATEMENT

This case concerns the ownership of the bed of Utah Lake, a freshwater lake in Utah County that is drained by the Jordan River, which flows northward and empties into the Great Salt Lake. The parties have stipulated that Utah Lake was navigable on January 4, 1896, the date on which Utah was admitted to the Union (J.A. 12; Pet. App. 8a n.4). Under the equal footing doctrine, lands beneath navigable waters in territories acquired by the United States ordinarily pass to the new States that are created out of those territories. However, in some situations, action by the United States with respect to the bed prior to statehood may have the effect of defeating the new State's claim. In this case, both courts below held that Utah did not obtain title to the bed of Utah Lake upon its admission to the Union in 1896 because the United States had reserved the lands underlying the Lake as a reservoir site in 1888.[1]

The Sundry Appropriations Act of October 2, 1888, ch. 1069, 25 Stat. 505 *et seq.* (the "1888 Act"[2]) authorized the United States Geological Survey to select "sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows" (25 Stat. 526). The 1888 Act further provided that "all the lands which may hereafter be designated or selected * * * for sites for reservoirs * * * are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law" (25 Stat. 527).

---

[1] Petitioner also contended in the courts below that it obtained title to the bed of Utah Lake under the Submerged Lands Act of 1953, 43 U.S.C. 1301-1303. That claim was rejected by the courts below (Pet. App. 24a-26a, 40a-41a), and petitioner does not renew it here.

[2] As used herein, the terms "1888 Act" and "1890 Act" (see page 4, *infra*) refer to only the relevant paragraph of each Act.

On April 6, 1889, Major John Wesley Powell, the Director of the Geological Survey, submitted a report to the Secretary of the Interior "[i]n conformity with the act approved October 2, 1888" (Dfdts' Mot. for Sum. Jdgmt., Exh. A (J.A. 19)). Major Powell stated that the "site of Utah Lake in the Territory of Utah is hereby selected as a reservoir site, together with all lands situate within two statute miles of the border of said lake at high water" (*ibid*). He recommended that pending a more accurate designation, the Land Office at Salt Lake City should be instructed to refuse further entries of public lands within the described limits, because such entries would tend to "obstruct the use of the lake as a natural reservoir for the irrigation of lands below its outlet" (*ibid.* (J.A. 20)). On April 11, 1889, the Commissioner of the General Land Office informed the Salt Lake City Office of Major Powell's selection of "the site of Utah Lake" as "a reservoir site" and instructed that Office "to refuse further entries or filing on the lands designated, in accordance with the Act of October 2, 1888" (*id.* Exh. B (J.A. 21)). On April 13, 1889, the Secretary of the Interior informed Major Powell that he had received the latter's notification regarding Utah Lake and that the requested instructions had been issued to the Land Office (*id.* Exh. C (J.A. 22)).

The selection of Utah Lake thereafter was confirmed in the official reports of the Geological Survey, which were formally transmitted to Congress. The Tenth Annual Report, for the fiscal year ending June 30, 1889, stated that Utah Lake had been examined "with reference to its capacity for a reservoir site" and that the Geological Survey had determined "the specifications for its withdrawal as such under the law, so far as the *lands covered or overflowed by it* or the lands bordering upon it were still public lands" (4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5) 51st Cong., 1st Sess. 88 (1890) (J.A. 25) (emphasis added)). The Report also listed "Utah Lake" in a table of "Reservoir Sites Selected" (*id.* at 63 (J.A. 24)). The Eleventh Annual Report, for fiscal year 1890, stated that a "careful survey" had since been made of Utah Lake and that the "segregation" of lands for the reservoir was

made to include "*not only the bed but the lowlands up to mean high water*" (4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 2d Sess. 183-184 (1890) (J.A. 28-29) (emphasis added)). Similarly, the Twelfth Annual Report stated that there had been a "segregation of the land around and under the lake" (4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5), 52d Cong., 1st Sess. 339 (1892) (Pet App. 13a)).

After the Geological Survey informed Congress of the selection of the bed of Utah Lake, Congress, in the Sundry Appropriations Act of 1890, ch. 837, 26 Stat. 371 *et seq.* (the "1890 Act"), repealed the 1888 Act. However, the 1890 Act contained a savings clause, which provided "that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888] act, until otherwise provided by law" (26 Stat. 391). In the years since 1890, Congress has not "otherwise provided by law" for a disposition of the lands underlying Utah Lake.

2. In 1976, the Department of the Interior issued oil and gas leases for certain of the lands underlying Utah Lake (Pet. App. 2a). Petitioner subsequently commenced this suit on May 22, 1979, in the United States District Court for the District of Utah against the United States, the Secretary of the Interior, and other officials of the Interior Department (J.A. 1, 4-7). Petitioner sought a declaratory judgment that it, rather than the United States, had title to the lake bed, and an injunction against interference with its alleged ownership and management rights (J.A. 6-7; Pet. App. 3a, 28a-29a).[3] The district

[3] The district court held that it had jurisdiction over this suit under 28 U.S.C. 1331 and the Quiet Title Act, 28 U.S.C. 1346(f) and 2409a (Pet. App. 31a-32a, 36a). However, the court of appeals, relying on *Block* v. *North Dakota*, 461 U.S. 273 (1983), held that the Quiet Title Act provided the sole basis for jurisdiction (Pet. App. 4a n.2). See also *United States* v. *Mottaz*, No. 85-546 (June 11, 1986), slip op. 6-7, 12-13.

In district court, respondents contended that petitioner's suit was barred by the 12-year limitations period prescribed by 28 U.S.C. 2409a(f) for suits under the Quiet Title Act (J.A. 8, 14). The district court rejected that contention, finding that, despite

court granted summary judgment for respondents, holding that title to the bed of Utah Lake is in the United States (Pet. App. 28a-41a). The court found that "[t]he language used in the correspondence and documents surrounding the 1889 withdrawal expressly include the bed of Utah Lake" (*id.* at 36a-38a). As a result of that prior reservation, the court held that petitioner did not acquire title to the bed under the equal footing doctrine upon admission to the Union in 1896 (*id.* at 36a-40a).

3. A unanimous panel of the court of appeals affirmed (Pet. App. 1a-27a). The court first summarized the principles reiterated by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), concerning state claims to lands underlying navigable waters. The court recognized the general rule that lands under navigable waters pass to the States "when they enter the Union and assume sovereignty on an 'equal footing' with the established States" (Pet. App. 6a, quoting 450 U.S. at 551). But the court further recognized that "'Congress may sometimes convey lands below the high-water mark of a navigable water, "[and so defeat the title of a new State], in order to * * * carry out * * * public purposes appropriate to the objects for which the United States hold the Territory"'" (Pet. App. 7a, quoting 450 U.S. at 551, and *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894)). Finally, the court noted that the United States is presumed not to have made a pre-statehood conveyance of such lands and that a conveyance will be found only if the intention is "'"made plain"'" (*id.* at 7a-8a, quoting 450 U.S. at 552, and *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926)) or "'in terms embraces the land under the waters'" (Pet. App. 8a, quoting 450 U.S. at 552, and *Packer* v. *Bird*, 137 U.S. 661, 672 (1891)).

correspondence between the Secretary of the Interior and the Governor of Utah in 1963 and a Regional Solicitor's opinion in 1965, the evidence did not establish that petitioner knew or should have known of the United States' claim (Pet. App. 32a-36a). Respondents did not challenge that holding in the court of appeals (Pet. App. 4a n.2).

Although this Court in *Montana* discussed the foregoing principles in the context of an alleged pre-statehood conveyance by the United States to a third party, the court of appeals agreed with the Ninth Circuit that "the same principles also apply to pre-statehood reservations or withdrawals by the United States" (Pet. App. 8a, citing *United States* v. *City of Anchorage*, 437 F.2d 1081, 1084-1085 (9th Cir. 1971), and *United States* v. *Alaska*, 423 F.2d 764, 766-768 (9th Cir.), cert. denied, 400 U.S. 967 (1970)). Applying these principles, the court held that petitioner's claim was defeated by the United States' reservation of the bed as a reservoir site in 1888 (Pet. App. 9a-24a).

The court of appeals first agreed with the district court that the language of Major Powell's selection and the annual reports of the Geological Survey "reveals that the United States intended to and did in fact select the entire lakebed as part of the 1889 reservoir site selection" (Pet. App. 13; see *id.* at 9a-13a). The court then rejected petitioner's contention that even if the 1889 selection included the lake bed, the 1888 Act did not authorize that selection (*id.* at 13a-21a). The court reasoned that: (i) the 1888 Act authorized the withdrawal of "all the lands" designated as reservoir sites, not merely dry lands above the water line (*id.* at 14a-15a); (ii) Congress expressly preserved existing withdrawals of reservation sites when it passed the 1890 Act (*id.* at 15a-16a); (iii) further statutory amendments in 1891 and 1897 likewise did not modify the reservation of the lands underlying Utah Lake (*id.* at 16a-17a); and (iv) the general statements in the legislative history relied upon by petitioner did not overcome the plain language and contemporaneous interpretation of the 1888 Act and failed to establish that the purposes of the 1888 Act were inapplicable to land underlying navigable lakes (*id.* at 17a-21a).

The court of appeals also rejected petitioner's contention that even if authorized by the 1888 Act, the reservation of the bed of Utah Lake as a reservoir site did not defeat the State's claim because the reservation was

not in response to some "'public exigency'" (Pet. App. 21a, quoting *Montana*, 450 U.S. at 556). The court noted that Congress may dispose of lands underlying navigable waters in a territory, with the consequence of defeating a new State's title, in order to carry out "'public purposes appropriate to the objects for which the United States hold the Territory'" (Pet. App. 22a, quoting *Montana*, 450 U.S. at 551, and *Shively*, 152 U.S. at 48). In the court's view, the selection in this case was valid, because "the withdrawal of Utah Lake, including its bed, was made for a public purpose motivated by a public exigency, given Congress's stated concerns [in the 1888 Act] that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a).

SUMMARY OF ARGUMENT

I. Under the equal footing doctrine, unappropriated lands underlying navigable waters in a territory of the United States ordinarily pass to the new State upon its admission to the Union. However, because Congress has complete ownership of and sovereignty over such lands, Congress may convey them prior to statehood and thereby defeat the new State's claim. A pre-statehood reservation of a lake or river bed by the United States, to be devoted to a special federal purpose, has the same effect on the new State's claim. Congress acts in two capacities in providing for such a reservation: it "*dispose*[*s*] of * * * the Territory [or] other Property belonging to the United States" in the public domain (Art. IV, § 3, Cl. 2), and it *acquires* property to be used in programs authorized pursuant to Congress's powers under that Clause and Article I. Because the United States therefore effectively conveys the property to itself, such a transaction is the same for purposes of the equal footing doctrine as a conveyance to a third party, which concededly defeats the new State's claim.

The purposes underlying the equal footing doctrine do not suggest that the United States is constitutionally foreclosed from reserving the unappropriated beds of

navigable waters as the property of the United States. To the contrary, such a reservation retains the property in sovereign ownership and control. Congress can thereby protect the public interest in navigation, fishing and other uses of the overlying waters and even permit the bed to pass to the State in the future if circumstances warrant. This special status of reserved lands also is reflected in the Utah Enabling Act, which provides that lands in federal reservations are not among those granted to the State for school purposes upon its admission to the Union. The decisions of this Court and the courts of appeals further support the conclusion that reserved lands do not pass to the State under the equal footing doctrine.

II. The bed of Utah Lake was reserved by statute for reservoir purposes in 1888, and it therefore did not pass to Utah upon its admission to the Union in 1896. The Sundry Appropriations Act of 1888 authorized the Geological Survey to select reservoir sites on federal lands and provided that those sites were "hereby henceforth reserved" as "the property of the United States." 25 Stat. 526-527. The record clearly establishes, and both courts below found, that the Geological Survey selected the bed of Utah Lake as a reservoir site in 1889, which automatically triggered its reservation under the 1888 Act. Moreover, the Geological Survey formally reported that selection to Congress, which then ratified it by providing in the Sundry Appropriation Act of 1890 that all reservoir sites that had been selected were to remain reserved "until otherwise provided by law." 26 Stat. 691. Congress again declined to disturb that reservation when it amended the 1888 Act in 1891 and 1897, and it has not "otherwise provided" for a disposition of the lands underlying Utah Lake since that time. Those lands therefore remain part of a federal reservation.

Contrary to petitioner's contention, the Geological Survey's selection of Utah Lake was clearly authorized by statute. The 1888 Act broadly provided for the selection of reservoir sites throughout the "arid region" and for the reservation of "all the lands" so selected; there was no exception for any lands that happened to underlie

navigable waters. Moreover, the selection of Utah Lake was approved by Major John Wesley Powell, the Director of the Geological Survey, who drafted the statutory language authorizing the selection of reservoir sites and was intimately familiar with irrigation in the arid region. The purposes of the 1888 Act also support its application here. The Act's purpose of protecting against speculation in and monopolization of lands needed for irrigation projects was applicable, because it was anticipated that the level of the Lake would be lowered, which would have exposed some of its bed to settlement. But the Act was further intended to freeze *all* reservoir sites in federal ownership, in order to preserve Congress's options for developing them in the future. The absence of a specific mention of the beds of navigable lakes in the legislative history does not suggest that they were implicitly excluded from coverage. Because the beds were not to be granted to private parties and because the navigability of overlying waters would have no bearing on the suitability of a reservoir site, Congress had no occasion to consider treating such lands differently.

III. Contrary to petitioner's contention, this Court's decisions do not suggest that Congress's constitutional authority to dispose of the bed of a navigable body of water is limited to situations of "public exigency." To the contrary, the Court repeatedly has said that Congress may make such a disposition "whenever" necessary to further "public purposes appropriate to the objects for which the United States hold the territory." *Shively* v. *Bowlby*, 152 U.S. 1, 48 (1894). The term "public exigency" is used in the cases only to describe the circumstances in which Congress, as a matter of policy, has provided for grants of submerged lands to private parties, and therefore only as a guide to congressional intent. An "appropriate public purpose" for the reservation of federally owned lands is the same as a "public use" that, under the Fifth Amendment, would justify the United States' acquisition of the same property by condemnation. The reservation of the bed of Utah Lake as a reservoir site clearly was for a proper "public use" and "public purpose," and in-

deed petitioner does not argue otherwise. Moreover, even a test of "public exigency" would require only that the disposition be "necessary," which under *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), likewise connotes "appropriate." In any event, the urgent circumstances confronting Congress in 1888 would satisfy a more stringent standard of "public exigency" as well.

ARGUMENT

I. THE PRE-STATEHOOD RESERVATION BY THE UNITED STATES OF UNAPPROPRIATED LANDS UNDERLYING A NAVIGABLE BODY OF WATER FOR A PARTICULAR FEDERAL PURPOSE PREVENTS OWNERSHIP OF THOSE LANDS FROM PASSING TO A NEW STATE UNDER THE EQUAL FOOTING DOCTRINE

States admitted to the Union after adoption of the Constitution are deemed to be on an "equal footing" with the original thirteen States. The core of this principle of equality pertains to the political participation by each State within the framework of the Federal Constitution and to the sovereignty of each over its own internal affairs. *Stearns* v. *Minnesota*, 179 U.S. 223, 244-245 (1900); *Coyle* v. *Smith*, 221 U.S. 559 (1911); *United States* v. *Texas*, 339 U.S. 707, 716 (1950). In at least one context, however, the equal footing of the States also has a proprietary aspect: newly admitted States in general are held to have the same rights as the original thirteen States to the lands underlying navigable waters within their borders. But where, as here, the United States validly appropriates certain lands underlying navigable waters to a distinct and paramount federal purpose while the region is still a territory, those lands are thereby removed from the corpus of unappropriated submerged lands that pass to the State under the equal footing doctrine upon admission to the Union. As the nature and origins of the equal footing doctrine make clear, the State's claim in such a case cannot override the United States' prior and paramount rights that were acquired in the public interest of the Nation as a whole at a time

when the United States had ownership of and plenary control over the disposition of those territorial lands.

A. When the region comprising the original thirteen States was first settled, "the title and the dominion of the tide waters and the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be established;' and, upon the American Revolution, vested absolutely in the people of each State for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Shively*, 152 U.S. at 49, quoting *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 409-411 (1842). But the origins and rationale of the State's ownership of the bed are not strictly proprietary; rather, the State is often described as holding the lands in "trust," in order to assure the enjoyment of certain public rights and the furthering of public purposes, such as fishing and the promotion of navigation. *Ibid.*; see generally *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387, 452-458 (1892). It is for this reason that the ownership of lands underlying navigable waters is viewed as "an incident of sovereignty" (*Montana* v. *United States*, 450 U.S. 544, 551 (1981)) and that "a presumption against their separation from sovereignty must be indulged" (*United States* v. *Oregon*, 295 U.S. 1, 14 (1935)).

When the United States acquires territory, it also acquires the same title and dominion over lands underlying navigable waters as are possessed by the States. Those submerged lands thereafter "are held by the United States for the benefit of the whole people, and, as this court has often said, * * * 'in trust for the future States' " (*Shively*, 152 U.S. at 49, quoting *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212, 222 (1845)), "to be granted to [the] States when they enter the Union and assume sovereignty on an 'equal footing' with the established States" (*Montana*, 450 U.S. at 551).

Language in *Pollard's Lessee* further suggested that the United States lacked the *power* to grant any land below the high water mark of navigable waters in a ter-

ritory of the United States. But as the Court observed more than 90 years ago with respect to those dicta, "it is evident that this is not strictly true." *Shively*, 152 U.S. at 47; see also *id.* at 28. Indeed, only several years after *Pollard's Lessee* was decided, the Court had stated with respect to lands underlying navigable waters in Alabama that "[u]ndoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a State." *Goodtitle* v. *Kibbe*, 50 U.S. (9 How.) 471, 478 (1850). See also *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 83-85 (1922); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 645-647 (1970) (White, J., dissenting). Thus, in *Shively*, after a thorough survey of the precedents since the earliest days of the Nation, the Court concluded (152 U.S. at 48 (citations omitted; emphasis added)):

> By the Constitution, as is now well settled, the United States having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the *entire* dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition.
>
> We cannot doubt, therefore, that *Congress has the power to make grants of lands below the high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so* in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or *to carry out* other *public purposes appropriate to the objects for which the United States hold the Territory.*

The Court has adhered to these principles ever since. In *Choctaw Nation*, the Court, citing *Shively*, found it to be "well settled that the United States can dispose of lands underlying navigable waters [prior to statehood,] just as it can dispose of other public lands" (397 U.S. at 633). Similarly, in *Montana*, the Court regarded it as "established * * * that Congress may sometimes convey lands

below the high-water mark of a navigable water," and "so defeat the title of a new State" (450 U.S. at 551). See also *Summa Corp.* v. *California ex rel. Lands Comm'n*, 466 U.S. 198, 206 n.4 (1984).

As is evident, although the Court's decisions use the word "trust" to describe the relation of the United States to the lands underlying the navigable waters in a territory of the United States, the United States has no constitutional obligation to retain such lands perpetually unencumbered because of the possibility that a new State might be created out of the territory at some time in the future. Congress cannot be disabled during the territorial period from performing the sovereign responsibilities of the United States Government, pursuant to its enumerated powers conferred by Article I as regards the role of the National Government and its distinct and plenary "Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States" (Art. IV, § 3, Cl. 2).

Accordingly, when considering the appropriate use or disposition of lands underlying navigable waters during the territorial period, Congress has full authority to consider the interests of and to act on behalf of the people in the Nation as a whole, as well as the people of the territory. This follows from Congress's "entire dominion and sovereignty, national *and* municipal, Federal *and* state, over all the Territories" (*Shively*, 152 U.S. at 48 (emphasis added)). In fact the Court in *Shively* made clear that the United States holds the lands underlying navigable waters in the territories not only "in trust for the future States," but also "for the benefit of the *whole people*" (152 U.S. at 49, 58 (emphasis added)). For this reason, Congress does not violate a "trust" obligation to a future State and its citizens if, in the interests of the Nation as a whole, it makes an appropriate disposition of the bed of a navigable body of water while the region remains a territory. Cf. *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983).

B. Petitioner contends, however, that a State's claim to the bed of a navigable body of water may be defeated

only by a grant or other conveyance of the land by the United States to a third party prior to statehood. In petitioner's view, a State's claim of title must prevail over that of the United States under *all* circumstances in which the United States retains title to the land at the time the State is admitted to the Union—even where, as here, Congress explicitly withdrew the bed from the unappropriated lands prior to statehood and reserved it as the property of the United States to be devoted to a distinct and paramount federal purpose. This argument cannot be squared with the supremacy of the laws and actions of the United States in the areas of its constitutional responsibilities.

1. Congress has the unquestioned power to acquire property in aid of the other powers conferred on it by the Constitution, whether the property is situated in a State or territory. *Kohl* v. *United States*, 91 U.S. 367 (1875); Art. I, § 8, Cl. 18 (Necessary and Proper Clause). The property of a State—including land underlying a navigable body of water—may be acquired by the United States in the same manner as that of a private person, either by purchase or by the exercise of the power of eminent domain, with the payment of compensation. See *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983); see also *United States* v. *50 Acres of Land*, 469 U.S. 24, 31 & n.15 (1984).

However, when submerged lands are still within a territory, there is no need for the United States to pay compensation in order to appropriate them, because the United States already is the owner. This is so whether the United States appropriates the lands for governmental purposes relating specifically to the territory (such as for municipal improvements), to the broader interests of the Nation as a whole (such as for a military, National Park, National Forest, or Indian Reservation), or to a combination of the two (such as for an irrigation project). Moreover, because the United States not only owns the property but exercises complete dominion over it, there is no need for the United States to condemn the property in order to acquire it. Congress may simply provide for the submerged lands, like any other federal lands, to be appropriated or reserved to the special federal purpose, either directly by statute or by the authorized actions of an Executive official. Such a reservation or appropriation, like a conveyance of that land to a third party, is a "disposition" of the property within the meaning of Art. IV, § 3, Cl. 2 of the Constitution. See *United States* v. *Morrison*, 240 U.S. 192, 212 (1916); *United States* v. *Fitzgerald*, 40 U.S. (15 Pet.) 407, 420-421 (1841); *Wilcox* v. *Jackson*, 38 U.S. (13 Pet.) 498, 511-514 (1839)[4]; 1 C. Kinney, *Law of Irrigation* § 414, at 698-700 (2d ed. 1912); Act of Feb. 28, 1891, ch. 384, 26 Stat. 796.

Accordingly, when Congress authorizes or directs the reservation of unappropriated lands, it exercises not only its constitutional authority to acquire property in aid of the responsibilities of the Federal Government, but also its "Power to dispose of * * * the Terrtiory or other property belonging to the United States" (Art. IV, § 3, Cl. 2). In other words, the United States acts in two roles, effectively conveying land it holds in one capacity and acquiring it to be used in another. Compare *United States* v. *Dann*, 470 U.S. 39, 49-50 (1985). The United States thereby transforms its relation to the land from that of the residual holder of the public domain to that of the owner of the property in a more distinct and sovereign sense, in furtherance of Congress's enumerated powers under Article I as well as the Property Clause.

2. Nothing in this Court's decisions discussing the equal footing doctrine suggests that the United States is uniquely disabled from reserving or otherwise acquiring certain unappropriated federal lands for its special use in this manner merely because those lands happen to lie beneath navigable waters in a territory of the United States. To the contrary, in *Pollard's Lessee* it-

---

[4] See 38 U.S. (18 Pet.) at 513.

"[W]hensoever a tract of land shall have once been legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and * * * no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it."

self, the Court stated that upon its admission to the Union, a State succeeds to "the navigable waters, and soils under them * * *, *subject to the rights surrendered by the Constitution to the United States*" (44 U.S. (3 How.) at 229 (emphasis added)). One of the rights surrendered to the United States is that of *disposing* of the territory and other property of the United States, including by appropriation or reservation. Another is the right of *acquiring* property—even from a State after its admission to the Union, and, a fortiori, from the unappropriated "Property belonging to the United States" (Art. IV, § 3, Cl. 2) prior to statehood. Under the Supremacy Clause (Art. VI, Cl. 2), the exercise of those powers defeats the State's claim of title.

In addition, under the Court's equal footing decisions, it is "well settled that the United States can dispose of lands underlying navigable waters *just as it can dispose of other public lands.*" *Choctaw Nation*, 397 U.S. at 633 (emphasis added). The Court held in *Choctaw Nation* that Oklahoma did not receive title upon statehood to a segment of the bed of the Arkansas River because the United States, in a treaty entered into prior to Oklahoma's admission to the Union, had conveyed those lands to Indian tribes (*id.* at 633-634). It is, of course, irrelevant under the holding in *Choctaw Nation* whether the United States conveys fee title in submerged lands to the tribe or reserves the land to be held in trust for the tribe. Thus, in *Montana*, the Court cited *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 85, 88 (1918), for the proposition that the "establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shivley*," which would defeat the new State's claim. 450 U.S. at 556. Significantly, in *Alaska Pacific Fisheries*, not only did the United States retain legal title to the bed of the navigable waters that was included in the reservation; there was no permanent conveyance to the Indians of *any* compensable property interest in those lands (248 U.S. at 87-88). Rather, the Court described the arrangement in terms that apply equally here: "The reservation was not in the nature of

a private grant, but simply a setting apart, 'until otherwise provided by law,' of designated public property for a recognized public purpose" (*id.* at 88).

Similarly, the Court observed in *Holt State Bank* that there was "nothing in [the treaty] which even approaches a *grant* of rights in lands underlying navigable waters; *nor anything evincing a purpose to depart from the established policy * * * of treating such lands as held for the benefit of the future State*" (270 U.S. at 58-59 (emphasis added)). This passage plainly implies that a grant is not the only means by which the State's title will be defeated, if "anything" else sufficiently "evinces a purpose" to appropriate the property to another use. Further light is shed on this passage by the Court's observation earlier in the same paragraph that the reservation in question "was not *intended*" to "operate[] as a disposal of lands underlying navigable waters within its limits" (*id.* at 58 (emphasis added)); the Court did not suggest that Congress was without constitutional authority to make a "disposal" by reservation.

3. Petitioner necessarily concedes that the United States, prior to statehood, may grant submerged lands to a private party, and thereby defeat a new State's claim. Petitioner makes that concession even though such a conveyance places the property beyond the control of both the United States and the State, and may thereby frustrate the sovereign ability of either to regulate and control the use of the lands to protect the public interest in the use of the overlying waters. It would be anomalous indeed if the United States were to be barred by the Constitution from disposing of the very same lands to itself, in order to further what Congress has determined to be important *public* purposes.

Certainly the purposes underlying the equal footing doctrine and its rebuttable presumption against pre-statehood conveyances by the United States do not suggest that anomalous result. If the lands are placed in reserved status, there is no "separation from sovereignty"

(*United States* v. *Oregon*, 295 U.S. at 14). Congress, in providing for the administration of the lands, may take account not only of the interests of the Nation as a whole that underlie the federal reservation, but also of any distinct responsibility, in the nature of a public trust, that a State or territory might be thought to have as regards the lands. Cf. *Kleppe* v. *New Mexico*, 426 U.S. 529, 545-546 (1976); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923); *Missouri* v. *Holland*, 252 U.S. 416, 434 (1920).[5]

Nor does a federal reservation of the lands, unlike a grant to a private party, foreclose the possibility that the State may ultimately acquire title. For example, the reservation mandated by the 1888 and 1890 Acts in this case was not irrevocable; it continues only "until otherwise provided by law" (26 Stat. 391). If a State is formed in the territory in which the lands were situated at the time of such a reservation, and if Congress then determines that the lands are no longer needed for the special federal purpose that led to their reservation, Congress retains the authority to remove the submerged lands from the reservation, restore them to their prior status as unappropriated lands of the United States, and elect to pass them to the State. See Pet. App. 41a.

4. The effect of a federal reservation on the operation of the equal footing doctrine is but one aspect of the familiar relationship between the United States and the new States upon their admission to the Union. For example, Section 6 of the Utah Enabling Act (ch. 138, 28 Stat. 107), states that the grants of school sections and the indemnity selections shall not apply at any time to "sections embraced in permanent reservations for national purposes" and that no "lands embraced in In-

[5] The jurisdiction of the new State with respect to the waters overlying the reserved lands and any conduct occurring on those waters and lands would not be ousted by the reservation, except to the extent preempted by federal law. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404 (1917).

dian, military, *or other reservations of any character*" shall be subject to the grant and indemnity provisions "until the reservation shall have been extinguished and such lands be restored to and become part of the public domain" (*id.* at 109 (emphasis added)). See *United States* v. *Wyoming*, 331 U.S. 440, 445-446, 454-455 (1947); *Andrus* v. *Utah*, 446 U.S. 500, 506-507 (1980). Thus, the Utah Enabling Act, consistent with the relationship of the United States and the States under the Supremacy Clause, embodies the principle that lands reserved for a federal purpose pursuant to federal law are not among the unappropriated lands that are to be granted to a State upon its admission to the Union. In the absence of a reservation for a specific federal purpose, lands underlying navigable waters likewise remain unappropriated, "to be granted to such States when they enter the Union" (*Montana*, 450 U.S. at 551), albeit by operation of the equal footing doctrine. But if there has been a federal reservation, those lands neither pass to the State under the equal footing doctrine nor become available for selection by the State in satisfaction of statutory grants.

5. Finally, petitioner's submission that a federal reservation of lands underlying navigable waters cannot defeat a new State's title has been rejected by the only two courts of appeals that have squarely considered the issue—the Tenth Circuit in the instant case and the Ninth Circuit in two earlier decisions. In *United States* v. *Alaska*, 423 F.2d 764, 766-767, cert. denied, 400 U.S. 967 (1970), the Ninth Circuit held the reservation of the bed of a navigable lake, as part of federal wildlife refuge (see *Udall* v. *Tallman*, 380 U.S. 1, 5 (1965)), defeated Alaska's claim that title had passed to it upon admission to the Union. In a subsequent decision, the Ninth Circuit held that an Executive Order issued in 1915, which withdrew lands beneath tidal waters in Anchorage for construction of terminal facilities and docks for the Alaska Railroad, prevented title from passing to the State. *United States* v. *City of Anchorage*, 437 F.2d 1081, 1082-1085 (1971). Although the federal

statute did not by its terms authorize the reservation of lands underlying navigable waters, the court, noting the need for a railroad to develop the isolated interior and the need for terminal facilities for such a railroad, found that the reservation of the tidelands for the facilities was a "public exigency." *Id.* at 1084-1085. The court below correctly followed those Ninth Circuit decisions here (Pet. App. 8a).[6]

II. THE BED OF UTAH LAKE DID NOT PASS TO THE STATE UNDER THE EQUAL FOOTING DOCTRINE BECAUSE CONGRESS, IN THE SUNDRY APPROPRIATIONS ACTS OF 1888 AND 1890, RESERVED THE BED "AS THE PROPERTY OF THE UNITED STATES" FOR USE AS A RESERVOIR SITE

As we now explain, Congress has expressly reserved the bed of Utah Lake in federal ownership. Utah Lake was formally selected as a reservoir site by the Geological Survey in 1889, pursuant to the 1888 Act. The record unequivocally demonstrates, and both courts below found, that this selection included the bed of the Lake. By operation of the 1888 Act, "all the lands" so selected were automatically reserved "as the property of the United States," until further provided by law. After the Geological Survey informed Congress of the selection of the bed of Utah Lake, Congress in 1890 ratified the selection

[6] Petitioner also relies (Pet. Br. 19) on *United States* v. *California*, 436 U.S. 32 (1978). At issue in that case, however, was a post-statehood reservation by the President pursuant to the Antiquities Act. The reservation added to a national monument the submerged bed of the Pacific Ocean for one nautical mile around each of the islands in the monument. The Court held that the 1949 reservation did not prevent California from acquiring title to those lands pursuant to the Submerged Lands Act of 1953. The case therefore merely involved an interpretation of the Antiquities Act and the Submerged Lands Act. It did not hold, as petitioner argues, that the United States is *constitutionally* foreclosed, *prior* to statehood, from reserving rights in submerged federal lands, with the effect of defeating a new State's claim under the equal footing doctrine.

of that and other reservoir sites and continued their status as reserved lands of the United States, once again "until otherwise provided by law." Since 1890, Congress has not removed the lands underlying Utah Lake from their reserved status or otherwise provided by law for their disposition. By virtue of these statutory reservations in 1888 and 1890, ownership of the bed of Utah Lake did not pass to the State upon its admission to the Union, but instead remains in the United States.

A. The Administrative Selection of Utah Lake As a Reservoir Site Specifically Included the Bed of the Lake

The record clearly establishes that the lands underlying Utah Lake were selected as a reservoir site pursuant to the 1888 Act. In his letter of April 6, 1889, Major John Wesley Powell, the Director of the Geological Survey, informed the Secretary of the Interior that the "site of Utah Lake"—"together with all lands situate within two statute miles of the border of said lake at high water"—had been selected as a reservoir site "in conformity with the act approved October 2, 1888" (J.A. 19). The phrase "site of Utah Lake" in this context connotes not merely topographical location, but also the lands on which the reservoir would actually be situated.[7]

Thereafter, in the Tenth Annual Report of the Geological Survey, which was formally transmitted to Congress, Major Powell stated that a Mr. Newell had been sent to examine Utah Lake "with reference to its capacity for a reservoir site," in order that he might "furnish the specifications for its withdrawal as such under the law, so far as the *lands covered or overflowed by it* or the lands bordering upon it were still public lands"

[7] See IX *Oxford English Dictionary* (1933 ed.) (def. 3 of "site": "The ground or area upon which a building, town, etc., has been built, or which is set apart for some purpose. Also, in mod. use, a plot, or number of plots, of land intended or suitable for building purposes"); *Webster's Third New International Dictionary*, at 2128 (1976) (def. 2b: "a space of ground occupied or to be occupied by a building").

(*id.* at 88) (J.A. 25) (emphasis added)). See also *id.* at 63 (J.A. 24) (listing "Utah Lake" among "Reservoir Sites Selected").[8] In the Eleventh Annual Report, Congress was informed that a "careful survey" had been made of Utah Lake during the intervening year, and that the "segregation" of the Lake as a reservoir site included "*not only the bed* but the lowlands up to mean high water" (*id.* at 184) (J.A. 29) (emphasis added).[9]

As the district court found on the basis of this evidence, "[t]he language used in the correspondence and documents surrounding the 1889 withdrawal expressly includes the bed of Utah Lake" (Pet. App. 38a). The court of appeals affirmed this finding, observing that "[t]he language of these documents reveals that the United States intended to and did in fact select the entire lakebed as part of the 1889 reservoir site selection" (*id.* at 13a).[10] Petitioner does not contend that this concurrent finding by the courts below is clearly erroneous (see Pet. Br. 36 n.19), and it therefore is controlling here.

---

[8] The Secretary of the Interior stated in his report to the President, which also was transmitted to Congress, that reservoir sites had been selected in several States and Territories, including Utah, and that "those selections have been approved by the Department" (Tenth Annual Report, *supra*, at xxiii-xxiv). See also J.A. 21, 22.

[9] The Eleventh Annual Report listed each section of land that had been segregated at the Utah Lake site, for a total of 125,440 acres (*id.* at 184-189) (J.A. 29-38)), and included a map showing the Lake and the adjacent parcels that had been withdrawn (*id.* Plt. xcv). This Report also contained a separate narrative account of water conditions in the Utah Lake water system (*id.* at 70-74), describing the way in which the Lake could capture and spread flood waters over a broad basin, from which they could be gradually released through the river below (*id.* at 71).

[10] The court of appeals also relied on the Geological Survey's Twelfth Annual Report (at 339), which informed Congress that the Survey had segregated "the land around and *under the lake*" (Pet. App. 13a (emphasis added)). This passage is quoted more fully in App., *infra*, 3a-4a.

B. By Virtue Of Its Selection By The Geological Survey As a Reservoir Site, The Bed Of Utah Lake Was Automatically Reserved By the 1888 Act

The 1888 Act provided that "*all* the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs * * * are from this time henceforth hereby reserved from sale *as the property of the United States*, and shall not be subject after passage of this act, to entry, settlement, or occupation until further provided by law" (25 Stat. 527 (emphasis added)). As a result of the Geological Survey's selection, the bed of Utah Lake was automatically reserved, by operation of the 1888 Act, "as the property of the United States." And because the relevant documents expressly include the bed of the Lake in the designation, any presumption against a pre-statehood reservation of land underlying navigable waters has unquestionably been satisfied: the intention to reserve the land was "rendered 'in clear and especial words'" and "'in terms [that] embrace[d] the land under the waters'" (*Montana*, 450 U.S. at 552, quoting *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842), and *Packer* v. *Bird*, 137 U.S. at 672).

Petitioner contends (Pet. Br. 36 n.19), however, that the administrative actions of the Secretary of the Interior and the Director of the Geological Survey are "irrelevant," because, in petitioner's view (Pet. Br. 21-31), those officials had no authority under the 1888 Act to select and withdraw the bed of the Lake. This contention is without merit. The statutory basis for the reservation of Utah Lake is compelling.

1. *The Reservation Under The 1888 Act Occurred By Operation Of Law; It Was Not An Administrative Withdrawal*

As an initial matter, petitioner errs in characterizing (Pet. Br. i, 4, 21) the reservation of the bed of Utah Lake as an *administrative* withdrawal by the Geological Survey. As the statutory text makes clear, it was the 1888 Act itself that "henceforth hereby reserved" the

bed of Utah Lake and all other land that was found to be suitable for reservoir sites.

The legislative history confirms this understanding. As passed by the Senate, the bill provided that "all the lands which may be designated for reservoirs and canals for irrigation shall be reserved as property of the United States, and shall not be subjected to entry or settlement until hereafter provided for by law" (19 Cong. Reg. 7031-7032 (1888)). This language might have been understood to leave the actual reservation of lands to Executive officials, after the lands were designated as reservoir or canal sites. The provision then was amended in the House in three respects: (i) the reservation was made to occur by operation of law; (ii) it was made effective as of the enactment date; and (iii) the scope of the reservation was expanded to include not only sites for reservoirs and canals, but also lands susceptible of irrigation. These provisions were retained in the 1888 Act as finally passed.[11]

Representative Symes explained that the House amendment had been framed "for the particular purpose of reserving from this time forth the lands which should be selected as the sites of the reservoirs" (19 Cong. Rec. 8507 (1888)). He continued (*ibid.* (emphasis added)):

> That is the intention of the amendment and its effects as it now stands. * * * [T]hat is to say, *from now on all lands selected for reservoirs, ditches, or canals shall be absolutely reserved, and that if A, B, or C in the meantime locates upon them that he shall be subject to be dispossessed*, if the sites are necessary for such purposes.

[11] The appropriations bill originated in the House, but the provision for survey and reservation of reservoir sites was added as a floor amendment (No. 119) in the Senate. 19 Cong. Rec. 7012-7032 (1888). The House refused to concur in that and other Senate amendments (*id.* at 7360, 7681-7682), and the first conference committee was unable to reach agreement on a number of amendments, including No. 119 (*id.* at 7964-7965). The House then adopted a substitute for the Senate amendment, which reduced the appropriation to $100,000 and incorporated a reservation provision that was essentially identical to the one ultimately included in the 1888 Act (*id.* at 8200, 8202, 8400, 8402, 8505, 8519, 8535, 8542-8543). However, this substitute was not accepted by the Senate until a subsequent conference committee added the final proviso, which permitted the President, by proclamation, to open any of the reserved lands to settlement under the homestead laws (*id.* at 8809, 8824, 8898-8899, 8980, 9012).

The Department of the Interior followed this interpretation in its administration of the Act. In an August 5, 1889 circular (see 21 Cong. Rec. Rec. 9156 (1890)), the Commission of the General Land Office stated that reservoir sites "are, since the passage of * * * [the 1888] act absolutely reserved from sale as property of the United States, and shall not be subject after passage of the act to entry, settlement, or occupation until further provided by law, or [until] the President, by proclamation, may open up said lands to settlement." The Attorney General later concurred in this interpretation, concluding that selection of a reservoir site results in "the reservation thereof *dating back to the passage of this act.*" 19 Op. Att'y Gen. 564, 566 (1890). Thus, Congress deemed the reservation of lands that were found to be suitable for reservoir sites and related irrigation purposes to be so imperative that it chose not to leave the reservation of those lands to the discretion of the Secretary and foreclosed the possibility that administrative delay might frustrate the reservation.[12]

2. *The 1888 Act Plainly Authorized The Selection Of The Bed Of Utah Lake As A Reservoir Site*

The first sentence of the 1888 Act clearly authorized the Geological Survey to select the lands underlying Utah Lake. That selection in turn triggered the statutory reservation of those lands pursuant to the third sentence of the Act, just discussed.

a. *The Statutory Text.* The first sentence of the 1888 Act made an appropriation of funds "[f]or the purpose

[12] The 1890 Act provides that reservoir sites selected after passage of that Act are reserved only from the date of selection, although reservoir sites (such as Utah Lake) that were located or selected prior to the 1890 Act remain segregated and reserved until otherwise provided by law. 21 Cong. Rec. 9150 (1890) (Sen. Allison).

of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and *for the selection of sites for reservoirs* and other hydraulic works *necessary for the storage and utilization of water for irrigation*" (25 Stat. 526-527 (emphasis added)). The term "sites for reservoirs" refers to the land on which the water actually would be stored. See note 7, *supra*. That interpretation may be most evident where the site consists of dry land that would be covered with water only after storage facilities are built. But the same interpretation is required where the site is a "natural reservoir" that already is covered by water in a lake. Although the lake would be converted into a reservoir for irrigation purposes (through modifications to its natural condition), the *site* for the reservoir would be the land on which the water would be stored after those modifications. Moreover, the congressional intent that the term "site" in the first sentence refer to the "lands" on which the reservoir would be situated is confirmed by the third sentence of the 1888 Act, which directly links the two terms by mandating that all the *lands* * * * selected * * * for *sites* for reservoirs" be reserved.

b. *Background and Legislative History.* For the reasons just stated, the selection of the bed of Utah Lake as a reservoir site was firmly supported by the plain language of the 1888 Act. "'Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Escondido Mutual Water Co.* v. *LaJolla Band of Mission Indians*, 466 U.S. 765, 772 (1984), quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

As petitioner concedes (Pet. Br. 22), nothing in the legislative history suggests that lands underlying navigable waters in a territory were to be excluded from the selection and reservation provisions of the 1888 Act. The very sweep of the Act's provisions for the reservation of lands sufficiently answers this or any other plea for an implied exception. After all, the bill was amended

during its consideration to provide for the reservation not only of sites for reservoirs and canals, but also of all arid lands that might be irrigated by those works (see page 24 and note 11, *supra*), which "had the practical effect of reserving all of the public lands in the West from settlement." *California* v. *United States*, 438 U.S. 645, 659 (1978).

To be sure, the reservation of the lands that were merely susceptible of irrigation was repealed two years later, in order to make those lands available for settlement. But Congress in 1890 did not disturb the statutory reservation of reservoir sites under the 1888 Act. That reservation was at the core of the all-embracing congressional intention to preserve under the ownership and control of the United States *all* federally owned lands that might be used for irrigation purposes. See pages 40-42, *infra*. "'[I]f we are to give [the statutory provision] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 521 (1982), quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966). Moreover, as we explain more fully below (pages 40-42, *infra*), the tenor of the debates on the 1888 Act reinforces the conclusion that its language must be broadly construed to embrace all potential reservoir sites that were still in federal ownership.

c. *Contemporaneous Administrative Construction.* It also is significant that the selection of the bed of Utah Lake occurred only 6 months after the 1888 Act was passed, and therefore was the product of the contemporaneous construction of the Act by those "'charged with the responsibility of setting its machinery in motion.'" *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984), quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Accord, *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 10. The Director of the Geological Survey at the time, John Wesley Powell, was known by Congress to be intimately familiar with the irrigation of arid lands, es-

pecially in Utah. His *Report on the Lands of the Arid Region*, which was completed and submitted to Congress in 1878, was a seminal work in the evolution of the Nation's reclamation policy. P. Gates, *History of Public Land Law Development* 645 (1968). In that report, Major Powell had described Utah Lake as a "natural reservoir" that could be utilized for irrigation with the addition of certain works (*Report on the Lands of the Arid Region of the United States, with a More Detailed Account of the Lands of Utah*, H.R. Exec. Doc. 73, 45th Cong., 2d Sess. 105, 120-124 (1878)), and he had urged that "[s]ites for reservoirs should be set apart, in order that no hinderance may be placed upon the increase of irrigation by the storage of water" (*id.* at 23).[13] Accordingly, when Congress passed the 1888 Act, it had every reason to expect that Utah Lake would be among the first sites selected.

Not only did Major Powell's background uniquely qualify him to interpret and implement the statutory directive; he proposed to Congress the very language in the first sentence of the 1888 Act pursuant to which the bed of Utah Lake was selected.[14] For this reason as well,

[13] The *Report on the Lands of the Arid Region* was transmitted to the Speaker of the House by the Secretary of the Interior, who "commend[ed] the views set forth by Major Powell * * * to the consideration of Congress" (H.R. Exec. Doc. 73, *supra*, at iii-iv).

[14] On March 20, 1888, the President signed a joint resolution that directed the Geological Survey to examine the "practicality of constructing reservoirs" and other factors bearing on the question of water storage for irrigation. Jt. Res. No. 7, 50th Cong., 1st Sess., 25 Stat. 618; 19 Cong. Rec. 1766, 1977 (1888). The Senate then passed a resolution on March 27, 1888, directing the Secretary to report on what appropriation would be necessary for that purpose, segregating lands susceptible of irrigation, and "designating places for reservoirs, canals and other hydraulic works." 19 Cong. Rec. 2428-2429 (1888).

In response to the Senate resolution, a report prepared by Major Powell was submitted to the Senate by the Secretary on May 11, 1888. Tenth Annual Report, *supra*, at 8-9. That report contained proposed language (see *id.* at 14) for the appropriations bill that was identical to the first sentence of the 1888 Act as eventually

Major Powell's contemporaneous selection of Utah Lake is entitled to special weight. *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979); *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 549 (1940).

C. Congress Ratified The Selection Of The Bed of Utah Lake As A Reservoir Site in 1890 And Retained It In Reserved Status

The statutory basis for the reservation of the bed of Utah Lake does not derive from the 1888 Act alone. The selection of the Lake as a reservoir site in 1889 was brought to the attention of Congress on a number of occasions, and Congress then ratified the selection of that and other reservoir sites in the 1890 Act. The designation of the lands underlying Utah Lake as a reservoir site was formally reported to Congress in at least three Annual Reports of the Geological Survey, the first of which was submitted to Congress well before it passed the 1890 Act. See pages 21-22, *supra*.[15] In addition, the

enacted, with two exceptions: (i) it did not contain the reference in the 1888 Act to the use of reservoirs for "prevention of floods and overflows"; and (ii) it provided for the appropriation of $250,000, rather than $100,000. See 19 Cong. Rec. 8462 (1888) (Rep. Forney) (referring to Major Powell's proposed amendment).

[15] The Tenth Annual Report was dated July 25, 1889 (*id.* Pt. 2, at 1) and was communicated to Congress at the beginning of the Fifty-First Congress (*id.* at cover), which commenced on December 2, 1889 (21 Cong. Rec. 27, 79 (1889)). See *id.* at 9146-9151. The "careful survey" of Utah Lake and the detailed designation of the sections reserved, which were described in the Eleventh Annual Report (see page 22, *supra*), obviously had also been completed before the 1890 Act was passed, because the 1890 Act became law on August 30 and the Eleventh Annual Report was submitted to the Secretary on September 1, 1890 (*id.* Pt. 2, at i).

The significance of these reports is underscored by the fact that the 1888 Act itself required the Director of the Geological Survey to report annually to Congress on the irrigation survey (25 Stat. 526-527). The selection of the beds of some existing lakes as reservoir sites also was brought to Congress's attention in a report to the Senate by the Secretary on July 30, 1890, while Congress was debating the 1890 Act (see note 17, *infra*), in response to a Senate resolution of July 10 (21 Cong. Rec. 7087 (1890)). See S. Exec.

use of Utah Lake as a reservoir and its selection as a reservoir site pursuant to the 1888 Act were discussed during extensive hearings held in the Spring of 1890 by committees in both the Senate and the House. Those hearings were convened for the specific purpose of evaluating the irrigation survey funded by the 1888 Act, the suitability and selection of reservoir sites, and the promotion of irrigation in the arid region generally.[16]

Approximately six months after completion of the hearings, and after many days of floor debate regarding the 1888 Act and the Nation's irrigation policy,[17] Congress

---

Doc. 199, 51st Cong., 1st Sess. 1 (1890) (referring to survey methods "[i]f the land reserved for the reservoir is not covered by the water of a lake," thereby making clear that some lands *were* covered by a lake); see also *id.* at 3.

[16] Major Powell's testimony before the House Committee is reproduced in the Eleventh Annual Report (at 203-289). In that testimony, he described Utah Lake as a "natural reservoir" that could be utilized for irrigation purposes with a relatively small expenditure of money (*id.* at 232-234; see also *id.* at 70-74).

Excerpts from Major Powell's testimony before the Senate Committee are reproduced in that Committee's comprehensive six-volume report on irrigation. S. Rep. 928, 51st Cong., 1st Sess. (1890). Utah Lake was included in a list furnished by Major Powell of all reservoir sites that had been selected and defined as of January 1890 (*id.* Pt. 4, at 81, 83-84). Major Powell testified that "Utah lake is a natural reservoir for the Jordan [River]" and that it could be used as a reservoir by damming the outlet, although the increase in the water level could flood some settled tracts bordering the Lake (*id.* at 39). He also testified that "the people of the western region were exceedingly anxious" that reservoir sites be promptly selected and that, based on his experience, he "knew that Utah Lake was a site" (*id.* Pt. 1, at 161). See also *id.* at 41-46.

The Senate Committee, accompanied by Major Powell, also conducted extensive field hearings, including a session in Salt Lake City. Once again, there was testimony about the use of Utah Lake as a reservoir (*id.* Pt. 3, at 14, 25, 29, 35, 39, 41, 48, 54, 55, 60-61). The Chairman of the Committee specifically referred to the reservation of land at Utah Lake, which he noted would prevent people from crowding onto land that was becoming exposed as the Lake receded during a dry period (*id.* at 29).

[17] See 21 Cong. Rec. 6045-6059, 7269-7291, 7319-7333, 7341-7361, 7393-7417, 7722-7729, 7765-7782, 7875-7879, 7928-7936, 7978-7989, 8275-8280, 8323-8332, 8426-8427, 9137-9140, 9145-9157 (1890).

passed the 1890 Act. That Act revised the 1888 Act in critical respects. But although the selection of the bed of Utah Lake had been called to its specific attention, Congress declined to disturb either that selection or the statutory interpretation on which it was based. Compare *FDIC* v. *Philadelphia Gear Corp.*, No. 84-1972 (May 27, 1986), slip op. 11; *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-382 (1982). To the contrary, Congress in 1890 expressly preserved all prior selections of reservoir sites. There was widspread public opposition in the West to the broad language of the 1888 Act that withdrew from settlement not only reservoir sites, but also all public lands that would be susceptible to irrigation if reservoirs were constructed at those sites. See *California* v. *United States*, 438 U.S. at 659; *Ide* v. *United States*, 263 U.S. 497, 501-502 (1924); P. Gates, *supra*, at 641-642.[18] The 1890 Act therefore repealed the 1888 Act insofar as it "provide[d] for the withdrawal of the public lands from entry, occupation and settlement" (26 Stat. 391).

There was no comparable degree of opposition to the reservation sites pursuant to the 1888 Act. In fact, the debates reflected considerable support for the proposition that reservoir sites still owned by the United States should be kept out of the hands of speculators and monop-

---

[18] The proviso to the 1888 Act would have permitted the President to open under the homestead laws any of the lands that were reserved by the 1888 Act, thereby permitting the Secretary to limit the impact of the statutory reservation of irrigable lands. However, the opening of irrigable lands to homesteading was delayed pending the survey of each reservoir site and adjacent lands. P. Gates, *supra*, at 641-642. Moreover, the President's authority to open reserved lands under the homestead laws was far narrower than the bar erected by the reservation, which also prevented entries under the mining laws (*Colomokas Gold Mining Co.*, 28 Pub. Lands Dec. 172, 174 (1899); cf. *John U. Gabathuler*, 15 Pub. Lands Dec. 418 (1892)); the timber and stone laws (*W.D. Harrigan*, 29 Pub. Lands Dec. 153 (1899)); and the Desert Land Act (21 Cong. Rec. 7780 (1890)); P. Gates, *supra*, at 641-642. The reservation also bars a State from selecting the lands under various statutory provisions for school-section and similar grants. See page 19, *supra*.

olists; that settlement or other disposal of potential reservoir sites might impede development by leading to claims for compensation when the works were to be built; and that reservoir sites should be preserved under federal control pending future legislation providing for orderly development of those sites.[19] Therefore, in an excepting clause in the 1890 Act, Congress specified that "reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888] act, until otherwise provided by law" (*ibid.*). Since the bed of Utah Lake had been "[t]heretofore * * * selected" as a reservoir site, the 1890 Act expressly ratified that selection and continued the reservation of the bed "as provided by [the 1888] Act"—*i.e.*, "as the property of the United States" (25 Stat. 527)—"until otherwise provided by law" (26 Stat. 391). Even if there were some doubt under the 1888 Act standing alone regarding the authority of the Geological Survey to select the bed of Utah Lake as a reservoir site, those doubts were erased by this explicit directive in the 1890 Act that reservoir sites previously selected "shall remain segregated and reserved." See, *e.g.*, *CFTC* v. *Schor*, slip op. 12; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381-382 (1969).

D. Congress Again Declined To Disturb The Reservation of Utah Lake in 1891 and 1897, When It Amended The 1888 and 1890 Acts

Congress again declined to disturb the reserved status of the bed of Utah Lake in 1891 and 1897, when it revisited the subject of irrigation and the use of the reservoir sites reserved by the 1888 Act.

1. The Act of March 3, 1891, ch. 561, 26 Stat. 1095 *et seq.*, made a number of the major revisions of the general land laws that were pending before Congress

[19] See, *e.g.*, 21 Cong. Rec. 6048 (Rep. Sayers); *id.* at 6050 (Rep. Mansur); *id.* at 6052 (Rep. DuBois); *ibid.* (Rep. Oates); *id.* at 6053 (Rep. Hemphill); *id.* at 6054 (Rep. Bynum); *id.* at 6055 (Rep. Morrow). Indeed, in the second part of the savings clause in 1890, Congress continued the authority of the Geological Survey to select reservoir sites in the future.

when it passed the 1888 and 1890 Acts. It repealed the Timber Culture and Preemption Acts and tightened the Desert Land Act to guard against abuses (§§ 1, 2, 4, 26 Stat. 1095-1097; P. Gates, *supra*, at 642), and it granted private individuals and corporations rights of way through "the public lands and reservations of the United States" for the construction of reservoirs, canals, and ditches for irrigation, provided that there was no interference with the government's right to occupy its reservations. §§ 18-21, 26 Stat. 1101-1102. Finally, in Section 17, Congress provided that reservoir sites selected or to be selected pursuant to the 1888 Act "shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs" (26 Stat. 1101; 43 U.S.C. 663). This amendment was enacted several months after the Geological Survey reiterated to Congress in its Eleventh Annual Report that the bed of Utah Lake had been selected as a reservoir site. But although the 1891 amendment reflected congressional concern that the reservation of reservoir sites might sometimes exceed the proper scope of the 1888 Act, Congress left in place the reservation of Utah Lake under the 1888 Act.

2. The 1891 Act appeared to authorize the private occupation and development of *all* reservoir sites on public lands and reservations, but it was administratively construed by the Secretary not to apply to reservoir sites reserved by the 1888 Act. 29 Cong. Rec. 1948 (1897) (remarks of Rep. Lacey). Accordingly, Congress expressly provided in the 1897 Act that *all* reservoir sites reserved or to be reserved by the United States were to be open to use and occupation under the 1891 Act. Act of Feb. 26, 1897, ch. 535 (29 Stat. 599, 43 U.S.C. 664); see *California* v. *United States*, 438 U.S. at 659. But Congress once again declined to disturb the 1888 Act reservations themselves.

Significantly, moreover, Congress provided in the 1897 Act that "any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an indi-

vidual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe" (29 Stat. 599). In so doing, Congress declined to adopt proposals to convey reservoir sites to the States. 29 Cong. Rec. 1847 (1897) (remarks of Rep. Cannon); *id.* at 1950 (remarks of Rep. Bell); see P. Gates, *supra*, at 647-651. Thus, even where a State proposed to develop the waters within its borders for the benefit of its citizens, Congress chose in the 1897 Act to retain under *federal* ownership and control the public lands that had been placed in reservation status by the 1888 Act. See *California* v. *United States*, 438 U.S. at 662, quoting 29 Cong. Rec. 1952 (1897) (remarks of Rep. Lacey) (" 'The reservoirs in which the water is stored belong to the government' "). The 1897 Act therefore further undermines petitioner's argument that Congress intended in the 1888 Act to exclude from coverage those reservoir sites that happened to underlie navigable waters in the territories, and instead to provide for title to and control over those sites to pass to the new States that might be created.

E. Petitioner's Contention That The Background Of The 1888 Act Supports An Implied Exclusion Of The Bed Of Utah Lake Is Without Merit

Petitioner essentially ignores the dispositive indicia of legislative intent discussed above: (i) the broad language of the 1888 Act providing for the selection of "reservoir sites" and mandating the reservation of "all the lands" so selected; (ii) the significance of Major Powell's involvement in the drafting and contemporaneous implementation of the statutory language; (iii) Congress's awareness of the selection of the lands underlying Utah Lake; and (iv) Congress's subsequent ratification of the reservation of that and other sites in the 1890 Act. Instead, petitioner relies on two inferences it seeks to extract from the background and legislative history of the Act.

First, petitioner attaches significance to the absence of any specific reference in the legislative history of the 1888 Act to what it labels "sovereign lands" (the beds

of navigable waters), as distinguished from "public lands." See Pet. Br. 27-29. Second, petitioner contends that the purpose of the 1888 Act was solely to prevent speculation in and monopolization of lands that would be suitable sites for reservoirs or be irrigated by them. In petitioner's view, this purpose did not extend to so-called "sovereign lands," because it was impossible for settlers to occupy lands that were under water. See Pet. Br. 24-26, 29-30, 33-34. For these reasons, petitioner urges that the 1888 Act should now be construed—nearly 100 years after it was passed and the bed of Utah Lake was reserved—to have implicitly excluded Utah Lake from coverage. There are numerous flaws in this analysis.

1. Petitioner's extended discussion of the term "public lands" and a supposed distinction between those and "sovereign lands" has no relevance to this case. The words "public lands" do not even appear in the 1888 Act. Whether those words should be understood to include the bed of Utah Lake therefore is beside the point. By contrast, the language that does appear in the 1888 Act broadly provides for the selection of reservoir sites throughout the "arid region" and for the automatic reservation of "all the lands" so selected. Petitioner has not shown that this expansive language was understood by anyone to exclude the bed of Utah Lake, which was widely regarded as a "natural reservoir" at the time the 1888 Act was passed and was selected as a reservoir site immediately thereafter. Nor does petitioner cite any occasion in the legislative history on which a Member used either the statutory language or petitioner's term ("public lands") in contradistinction to the term "sovereign lands" or its equivalent. In fact, the term "public lands" does not even appear in *any* of the excerpts that petitioner quotes (Pet. Br. 27-28 & n.15) from the legislative history.

Moreover, this Court has made clear that even where a statute does expressly refer to "public lands," the bed of a navigable body of water is not necessarily excluded and the statute's coverage must be determined by regular

guides to legislative intent. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 116-118 (1949). In the instant case, the term "public lands" readily would be understood to include the bed of Utah Lake, because the bed was in "public" ownership in 1888. See, *e.g.*, 43 U.S.C. 1702(e); 16 U.S.C. 3102(1), (2), and (3). Moreover, in *Choctaw Nation*, the Court described "lands underlying navigable waters" as "public lands" (397 U.S. at 633); the Geological Survey, in its Tenth Annual Report, described the lands covered by Utah Lake as "public lands" (*id.* at 88); and the 1890 Act referred to the lands withdrawn by the 1888 Act, which Congress knew to include the bed of Utah Lake, as "public lands" (26 Stat. 691).[20]

2. a. As we have shown, the plain language of the 1888 Act provided for the reservation of *all* lands in the

[20] The Court in *Hynes* distinguished the very decisions upon which petitioner relies (Pet. Br. 23-24) for its "public lands" argument. The Court noted that several of those decisions "ha[d] nothing to do with tidelands or coastal waters [*i.e.*, 'sovereign lands']," but instead concerned "whether the lands in question were subject to disposal as property of the United States, *i.e.*, public lands" (337 U.S. at 114 n.39, citing *Newhall* v. *Sanger*, 92 U.S. 761, 763 (1875), and *Barber* v. *Harvey*, 181 U.S. 481, 490 (1901)). The question in *Newhall* and *Barber* was whether disposal was prevented by private rights in the land. Here, by contrast, no private rights posed an impediment to Congress's reservation of the lake bed in 1888, and the lands underlying Utah Lake therefore "were subject to disposal as property of the United States, *i.e.*, public lands" (337 U.S. at 114 n.39).

With respect to *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935), the Court explained in *Hynes* that the tidelands already had passed to the State under the equal footing doctrine and therefore were not public lands of the United States (*id.* at 114 n.39, citing 296 U.S. at 17, 22). In *Mann* v. *Tacoma Land Co.*, 153 U.S. 273, 284 (1894), the Court held that scrip authorizing the entry of "unoccupied and unappropriated public lands" did not apply to tidelands. This case, of course, concerns "reserved," not "unappropriated," public lands (25 Stat. 527). Moreover, as noted in *Hynes* (337 U.S. at 115), *Mann* involved an allegedly permanent disposition into private hands, not a reservation of land in federal ownership and control; accordingly, the Court in *Mann* simply invoked the established presumption against reading general legislation granting public lands as applying to tidelands (153 U.S. at 284).

arid region that were suitable reservation sites, without exception for lands that happened to underlie existing lakes, whether navigable or not. A court cannot fashion an exception to such all-inclusive statutory text merely because there is not a specific reference in the legislative history to the precise factual circumstances before the court. *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 800-801 (1984). The Court has applied this principle of statutory construction to defeat claims by a State, including a claim to the bed of a navigable river under the equal footing doctrine. See *Block* v. *North Dakota*, 461 U.S. at 287-288 & n.24, 291; *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 159-162 & n.18 (1983).

b. Indeed, there would have been no occasion for Congress to consider a distinction between lands underlying navigable waters and other types of land subject to the 1888 Act. In the States of the arid region that had been admitted to the Union by 1888, the beds of navigable rivers and lakes already had passed to the States. Those beds were no longer "property of the United States" subject to reservation under the 1888 Act. By the same token, in the territories, such as Utah, it was "well settled" that "the United States * * * [had] the entire dominion and sovereignty, national and municipal, Federal and state" (*Shively*, 152 U.S. at 48). Congress therefore had the power to dispose of public lands below navigable waters in any territory of the United States for appropriate public purposes (*ibid.*), "just as it [could] dispose of other public lands" (*Choctaw Nation*, 397 U.S. at 633). Those appropriate public purposes plainly included the development of the water resources of the Utah Territory. There accordingly is no reason why the Fifty First Congress should have hesitated to include the beds of navigable waters in that Territory within the deliberately comprehensive reservation of *all* lands of the United States in the arid region that were suitable for reservoir purposes.

In the absence of a clear indication of congressional intent, a court may be reluctant to infer that Congress

has made a *private* grant of lands underlying navigable waters, because that would permanently remove the lands from the governmental control in the public interest that is an important incident of sovereignty. *Haynes*, 337 U.S. at 102-106; *Alaska Pacific Fisheries*, 248 U.S. at 87-88; *Illinois Central R.R.*, 146 U.S. at 452-458. By contrast, where, as here, the legislation would retain the submerged lands in federal ownership for a special federal purpose, the lands would remain subject to sovereign control, including the power of Congress to permit the lands to pass to a new State if the reservation no longer appeared necessary. For this reason, and because the navigability of overlying waters would not have any bearing on the suitability of a site for a reservoir, Congress would not have attached significance to whether some lakes or rivers affected by the 1888 Act were navigable. The absence of any affirmative indication in the legislative history of a congressional intent to treat submerged lands differently from all other federal lands therefore undermines rather than supports petitioner's argument for an implied exception to the broad language of the 1888 Act.

3. a. The purposes to be served by the 1888 Act likewise do not support an implied exception for Utah Lake. Petitioner focuses only on the purpose of preventing monopoly and speculation and the impediments to development that could result from the need to compensate individuals who might have entered lands that would be needed for an irrigation propect. Pet. Br. 24-26, 29-30, 33-34. But even if petitioner's narrow conception of the Act were correct, those purposes in fact *would* have been served by application of the Act to the bed of Utah Lake. As the court of appeals observed, "although officials of the [Geological Survey] initially thought that the water level of Utah Lake should be *raised*, subsequent studies indicated that the water level should be *lowered* below the natural shoreline," in order to minimize the amount of water lost to evaporation (Pet. App. 19a-20a, citing S. Rep. 928, *supra*, Pt. 3, at 61 (emphasis added)). If the water level were lowered, much of the lake bed would

have been exposed and settlers might have entered those lands, thereby posing the very potential for monopolization and speculation through abuse of the general land laws that Congress sought to prevent.[21]

Moreover, even if the normal level of the Lake had been lowered, the water occasionally would have risen to its previous level in times of flooding, which would have inundated the lands occupied by any settlers who moved onto the newely exposed lake bed. This potential in fact was explained in the extensive discussion of Utah Lake in the Geological Survey's Twelfth Annual Report (App., *infra*, 3a-4a). If settlement had been permitted to occur, the government might have been subject to monetary claims for flooding that resulted from the operation of the reservoir. *United States* v. *Virginia Electric Co.*, 365 U.S. 624, 632-636 (1961).[22] Compensation also might have been required for the use of any nonfederal lands, submerged or exposed, that were required for the construction of dams, dikes, or other works. Thus, there was the potential at Utah Lake, as else-

---

[21] Petitioner contends (Pet. Br. 25, 29, 33) that it would have been legally impossible for individuals to settle on the lands underlying Utah Lake because the general land laws did not apply to the beds of navigable waters. It is by no means clear, however, that the general land laws would have been inapplicable to the portions of the bed that were to be exposed when the water level was permanently lowered. In any event, Congress reasonably could decide to include in the 1888 Act an additional and comprehensive prohibition against the use and occupation of all reservoir sites, rather than to leave their protection to the notoriously inadequate safeguards of the then-existing general land laws. Moreover, the prohibition in the 1888 Act upon which petitioner relies is not on its face limited to dispositions of land that might occur under the general land laws of the United States. By its terms, that provision bars *any* "entry, settlement, or occupation" of reserved lands, even by a future State (or its grantee) under color of an equal footing claim.

[22] Similar disputes resulting from changes in the level of Utah Lake had occurred in the past. See note 16, *supra*; S. Rep. 928, *supra*, Pt. 6, at 39; Eleventh Annual Report, *supra*, at 233; Twelfth Annual Report, *supra*, at 336.

where, for settlement to impede the use of the lands for a reservoir site.[23]

b. In any event, petitioner errs in contending that the terms and purposes of the 1888 Act were limited to protecting against monopoly, speculation, and other impediments to development that could have resulted from private settlement on lands owned by the United States. The 1888 Act did not merely provide, in the final passage upon which petitioner relies (Pet. Br. 24-25), that the lands reserved for reservoir and other purposes would "not be subject * * * to entry, settlement or occupation." In the court of appeals' words, the 1888 Act also "provide[d] broadly" (Pet. App. 14a) that "all the lands" selected were to be reserved from sale "as the property of the United States."

In addition, the background and legislative history of the 1888 Act reveal that the lawmakers had a vision that transcended the immediate need to protect federally owned lands from improvident conveyance under then-existing land laws. The debates reveal an overarching desire to freeze the status of the designated lands, in order to assure that they would indisputably remain the property of the United States pending the determination by a future Congress as to how they should be used or disposed of. Some Members suggested that the Federal Government itself might eventually develop the sites by constructing large-scale irrigation projects—a course Congress ultimately chose 13 years later when it passed the Reclamation Act of 1902, ch. 1093, § 1, 32 Stat. 388 *et seq.* See *California* v. *United States*, 438 U.S. at 663-664; P. Gates, *supra*, at 643-656. Thus, Representative Vandever inquired rhetorically: if Congress can appropriate funds to remove "impediments from the navigation of streams whose sources are in the mountains," why "is it not proper to furnish great reservoirs from which water can be obtained to irrigate and fertilize the thirsty plains below, thus adding to the general wealth of the country

[23] Utah Lake now is included in plans for development of the Banneville Unit of the Bureau of Reclamation's Central Utah Project. See *Marsh* v. *Utah*, 740 F.2d 799, 800-801 (10th Cir. 1984).

incalculable millions by increase of the public domain for settlement?" 19 Cong. Rec. 8461 (1888). Representative O'Neill noted that private control of lands surrounding the Humboldt River in the Utah Valley had caused "injury" to the area's agricultural development, and he hoped that "millions" would be invested in a government reservoir system at the foot of the Rocky Mountains (*id.* at 8474-8475). And Representative Herbert, who opposed the reservation, also asserted that its true purpose was to establish federal involvement in reservoir construction and management (*id.* at 8471-8473).

Similarly, Senator Teller stated (*id.* at 7017-7018 (emphasis added)):

> It is not necessary that the United States go to the expense of building these dams, *but they must be put on land of the United States.*
>
> * * * * *
>
> But the time will come when the Government of the United States will have to do what every other government in the world has done in the arid regions—put out its money to build reservoirs.

Senator Teller later suggested in the alternative that once the data had been collected by the Geological Survey, Congress might convey the reservoir sites to the States (*id.* at 7027). Senator Manderson of Nebraska stated that diversions by Colorado ranchers "threaten[ed] to destroy the Platte [River] for the uses of Nebraskans" (*id.* at 7020). He continued (*ibid.*; emphasis added):

> [O]ne of the ways, perhaps the only way, by which the difficulty can be remedied, is that *the Government of the United States should take hold of this matter*, and prevent the improper or improvident use of the waters of these great rivers by those who live near their sources. *By the building of reservoirs such as are contemplated by this amendment*, it would be within the authority and power of the officers of the Government charged with that duty to see to it *that there was maintained in those reservoirs a proper supply of water* during the time when water was needed, *either for purposes of navigation or for purposes of irrigation on the lower portion of the rivers.*

Representative Symes disputed the notion that the 1888 Act committed the Federal Government to future irrigation projects, and, like Senator Teller, he foresaw the possibility that Congress might turn over "these reservoirs * * * to the States" (*id.* at 8510). And although Representative Felton believed that reservoir development would not be undertaken by the Federal Government, but by private capital, he foresaw a distinct federal role in the imposition of restrictions that would prevent private developers from becoming unfettered "lords of the manor, the soil, and the water" (*id.* at 8476). Representative Felton explained that the reservation of lands was necessary so that "at a future time some way of disposing of them may be determined upon, the same way as they surveyed the public lands in order to determine in what way they would dispose of them" (*id.* at 8471). See also *Ide v. United States*, 263 U.S. at 501-502 (the United States had not yet "become engaged in the reclamation of its arid public lands," but "was actively conducting investigations and collecting data with a view to developing and formulating a feasible plan for taking up and prosecuting that work").

Congress's options for the reserved sites were wide-ranging. The common theme of the supporters of the 1888 Act was that, in order to assure Congress a meaningful choice in the future, the United States must retain ownership of the sites. The 1888 Act resulted in large part from Congress's acknowledged inability to anticipate the results of the irrigation survey it was directing or the full range of factual and legal options that might be available to it; and the language Congress chose was deliberately broad, in order to protect against the unforeseen. It therefore would be especially inappropriate to fashion implied exceptions to the broad statutory language merely because some concerns articulated by Congress might not eventuate on a particular tract of land.[24]

[24] Petitioner cites (Pet. Br. 37-38 n.21) the enacting clause and Section 20 of the Utah Enabling Act, which provided, respectively,

6. Finally, petitioner's argument wholly fails to take account of the fact that Congress ratified the reservation of the bed of Utah Lake when it passed the 1890 Act. Even if petitioner were correct that the background of the 1888 Act was ambiguous concerning the Director's statutory authority, Congress's subsequent action has rendered that ambiguity irrelevant. The 1890 Act provides that reservoir sites "[t]heretofore located or selected" shall "remain segregated and reserved from entry or settlement "as provided in [the 1888] Act"—*i.e.*, "as the property of the United States" (25 Stat. 527)—"until otherwise provided by law" (26 Stat. 391). As Congress well knew in 1890, the bed of Utah Lake had been explicitly designated as a reservoir site in 1889. See pages 29-31, *supra*. By virtue of Congress's incorporation of that designation into the 1890 Act, Congress itself expressed in "'clear and especial words'" its intention to reserve the bed of Utah Lake as the property of the United States, and Congress's action "'in terms embrace[d] the lands under the waters'" (*Montana*, 450 U.S. at 552 (citations omitted)).

for Utah to be admitted to the Union on an "equal footing" with other States and for the repeal of all Acts "in conflict with" the Enabling Act. 28 Stat. 107, 112. However, as we have demonstrated, a pre-statehood disposition by Congress of land underlying navigable waters in no way "conflicts" with the principle of equal footing. It simply removes the affected tract from the category of unappropriated lands to which the equal footing doctrine applies if a State is created in the territory. Moreover, Section 6 of the Utah Enabling Act expressly excludes from state school-section and indemnity claims all lands included within *any* federal reservation. See pages 18-19, *supra*. There accordingly is no reason to believe that Congress intended the routine repealer clause in Section 20 of that same Act to *override* the reservation of federal lands underlying Utah Lake. See *United States* v. *Alaska*, 423 F.2d at 768.

III. THE RESERVATION OF THE BED OF UTAH LAKE BY THE 1888 AND 1890 ACTS FOR USE AS A RESERVOIR SITE WAS IN FURTHERANCE OF APPROPRIATE PUBLIC PURPOSES AND THEREFORE DEFEATS THE STATE'S CLAIM OF TITLE UNDER THE EQUAL FOOTING DOCTRINE

Petitioner argues (Pet. Br. 31-34) that even if Congress did reserve the bed of Utah Lake as a statutory matter, the 1888 and 1890 Acts nevertheless were ineffective to prevent title from passing to the State under the equal footing doctrine because, in petitioner's view, no "public exigency" justified Congress's appropriation of those lands for a reservoir site. Petitioner thus argues that the 1888 and 1890 Acts are unconstitutional, at least as applied to Utah Lake. "Judging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called upon to perform'" (*Walters* v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13, quoting *Blodgett* v. *Holden*, 275 U.S. 152, 148 (1927) (opinion of Holmes, J.)). Petitioner clearly has not shown that Congress exceeded its constitutional authority in this case.

A. The notion that Congress had no authority to dispose of the bed of Utah Lake except upon the showing of a "public exigency" finds no support in the text of the Property Clause of the Constitution or in this Court's decisions concerning Congress's authority under that Clause as a general matter. The Property Clause on its face imposes no "public exigency" prerequisite or other limitation on the exercise by Congress of its "Power to dispose of * * * the Territory and other property belonging to the United States" (Art. IV, § 3, Cl. 2). Compare U.S. Const. Amend. V ("nor shall property be *taken* for a *public use*, without just compensation" (emphasis added)). Moreover, this Court repeatedly has held that "[t]he power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'" *Alabama* v. *Texas*, 347 U.S. 272, 273 (1954), quoting *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 474 (1915) ("'Congress

may deal with [public domain lands] precisely as a private individual may deal with farming property. It may sell or withhold them from sale.'"); *United States* v. *San Francisco*, 310 U.S. 16, 29-30 (1940), quoting *Light* v. *United States*, 220 U.S. 523, 537 (1911) ("The power over the public lands thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered.'"); see also *Kleppe* v. *New Mexcio*, 426 U.S. at 536, 539-540; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404 (1917).

B. Nor do the Court's equal footing doctrine cases support a unique constitutional requirement of a "public exigency" in the particular context of the disposition of lands underlying navigable waters.

1. As petitioner recognizes (Pet. Br. 31-32), the use of the term "public exigency" in this setting originated in *Shively* v. *Bowlby*. In *Shively*, the Court stated that it had no doubt that Congress "has the *power* to make grants of lands below [the] high water mark of navigable waters * * * *whenever* it becomes necessary * * * to carry out * * * *public purposes appropriate to the objects for which the United States hold the Territory*" (152 U.S. at 48 (emphasis added); see also *id.* at 58). The Court did not use the term "public exigency" in this formulation of Congress's power. In fact, the Court stated only that an "appropriate public purpose" is a *sufficient* condition for such a disposal; the Court did not even state that such a purpose is a *necessary* condition, and that issue remains open.[25]

[25] The Court's reference to dispositions for an appropriate public purpose was simply one of a list of purposes whose validity, the Court stated, "[w]e cannot doubt" (152 U.S. at 48). Other dispositions, based on a lesser (or no) justification, were not foreclosed. See *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 85 (1922) (it is an open question whether the United States has "unrestricted power * * *, when exclusive sovereign, to part with the bed of such a stream for any purpose," or whether disposition is proper only for "a public purpose appropriate to the objects for which the United States hold the Territory," within the meaning of *Shively*); see also *Choctaw Nation*, 397 U.S. at 647 (White, J., dissenting) (noting question left open in *Brewer-Elliott*). Although principles of state public trust law have been held to limit the

By contrast, in the passage from *Shively* in which the term "public exigency" does appear, the Court was describing not the limits on Congress's constitutional authority, but rather Congress's past policy, which in turn assisted the Court in ascertaining Congress's present intent. Thus, the Court explained that Congress had "acted upon the policy" (152 U.S. at 58) that the lands underlying navigable waters would not be granted away during the period of territorial government, "unless in case of some international duty or public exigency" (*id.* at 50, 58). Against this background of past practices, the Court found nothing in the relevant statute "indicating any intention on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers" (*id.* at 51).

2. In subsequent cases, the Court has quoted or cited the passage from *Shively* concerning Congress's *power* to dispose of lands underlying navigable waters "whenever" necessary to further "appropriate" "public purposes," and it has viewed the relevant question to be whether Congress *intended* to make such a disposition. In answering that question, the Court has referred to the presence or absence of a "public exigency," if at all, only as reflecting Congress's past practice and therefore as a guide to ascertaining its present intent. See *Brewer-Elliott*, 260 U.S. at 80, 83-85; *Holt State Bank*, 270 U.S. at 54-55, 58; *Choctaw Nation*, 397 U.S. at 633.

3. Most recently, in *Montana*, the Court stated that "it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency' " (450 U.S. at 552, quoting *Holt State Bank*, 270 U.S. at 55). But the Court's opinion, read as a whole, demonstrates that this statement likewise was made with reference to the intent that will be attributed to Congress, and was not intended to prescribe a constitutional limitation on Congress's power. Thus, at the outset, the Court in *Montana* quoted the *Shively* passage acknowledging Congress's power to convey submerged lands for "appropriate" "public purposes" (450 U.S. at 551), and it then stated that a Court "must not infer" such a conveyance unless the " 'intention' " was " 'made plain' " or the grant " 'in terms embraces the land under the waters' " (*id.* at 552, 554 (citations omitted)). In ruling against the Tribe, the Court simply found an insufficiently clear expression of such an intention in the Crow Treaties (*id.* at 553-555); there was no suggestion of any constitutional impediment.

As an additional consideration, the Court stated: "Moreover, even though the establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively* * * *, the situation of the Crow Indians at the time of the treaties presented no 'public exigency' that would have required Congress to depart from its policy of reserving ownership of navigable waters for the future States," because "fishing was not important to their diet or way of life" (450 U.S. at 556). In this passage, the Court once again viewed the furthering of an "appropriate public purpose" as a sufficient constitutional justification for the exercise by Congress of its power to dispose of lands underlying navigable waters. Indeed, the Court indicated that the Executive Order reservation of submerged lands in *Alaska Pacific Fisheries* was such an occasion, because the Indians there depended upon fishing (*ibid.*). But because the Crow Indians did not depend upon fishing, the Court found no "public exigency" suggesting the need to protect a fishery on their behalf, and therefore no indication that the United States intended to depart from its usual policy of not conveying the beds of navigable rivers. *Montana* therefore is fully consistent with the Court's prior decisions holding that Congress has the power to dispose of the beds of navigable waters to further "appropriate" public purposes.

C. The conclusion that no more than an "appropriate" (*i.e.*, proper) public purpose need be shown is especially

---

authority of a state to dispose of certain interests in navigable waters and the lands underlying them (see *Illinois Central R.R.* v. *Illinois*, *supra*; *Appleby* v. *City of New York*, 271 U.S. 364, 395 (1926)), the Property Clause of the Federal Constitution by its terms does not impose any such restriction.

warranted in this case, because the United States' reservation of the property for a paramount federal use was the functional equivalent of the exercise of the power of eminent domain. If the lands underlying Utah Lake already had passed to the State under the equal footing doctrine and the United States then sought to reacquire them from the State through condemnation (see *Block* v. *North Dakota*, 461 U.S. at 291; page 14, *supra*), the relevant constitutional inquiry would be whether the property was taken for a "public use" (U.S. Const., Amend. V). In 1888, however, there was no occasion for a formal exercise of the power of eminent domain or for the payment of compensation wtih respect to the bed of Utah Lake, because the United States already had complete title to and dominion over those lands while Utah remained a Territory. It would be anomalous to impose a *higher* standard of necessity in such a case than is applied when the United States seeks to acquire the bed of a navigable body of water that already is owned by a sovereign State. It follows that, at a minimum, the United States has the constitutional power to reserve or appropriate lands underlying navigable waters in a territory upon the showing that the property would be devoted to a proper "public use" within the meaning of the Fifth Amendment—which we understand to be the equivalent of an "appropriate public purpose" under *Shively* and its progeny.

"The 'public use' requirement is * * * coterminous with the scope of a sovereign's police powers," and "the Court has made clear that it will not substitute its judgment for [Congress's] judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240-241 (1984), quoting *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668, 680 (1896). Moreover, "whether *in fact* the provision will accomplish its objectives is not the question: the constitutional requirement is satisfied if . . . the . . . Legislature *rationally could have believed* that the [Act] would promote its objective." *Id.* at 242, quoting *Western &*

Southern Life Ins. Co. v. *State Bd. of Equalization*, 451 U.S. 648, 671-672 (1981) (emphasis in original).

D. In this case, the reservation of the bed of Utah Lake was plainly for a "public use" or "public purpose[] appropriate to the objects for which the United States [held] the Territory"—if we assume, arguendo, that any such justification is required (see page 45 and note 25, *supra*). Both courts below held that the reservation at least satisfied this standard, in light of the important interest in setting aside land for the fair, orderly, and economical irrigation of arid lands (Pet. App. 23a, 39a-40a). At the very least, Congress rationally could have believed that these purposes would be served by the reservation of reservoir sites generally and of the lands underlying and surrounding Utah Lake in particular. In fact, petitioner does not contend that the "appropriate public purpose" standard was not satisfied in this case. Rather, petitioner argues only that a different standard should be applied. See Pet. Br. 31-34.

E. Even if petitioner were correct that this Court's decisions require the showing of a "public exigency," it is not clear that this standard would differ from that of an "appropriate public purpose." Although the word "exigency" often connotes a pressing need or sense of urgency, it does not follow that it imparts in this context a judicially enforceable standard of strict necessity. The word "exigency" also was used at the time of *Shively*, as now, to mean "[t]hat which is needed or required: demands, needs, requirements." IX *Murray's New English Dictionary* 411 (1897). In this sense, the word is essentially synonymous with "necessary." As was made clear in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which the Court considered the scope of Congress's authority under the Necessary and Proper Clause, the word "necessary" "has not a fixed character," but rather "admits of degrees of comparison" which may "increase or decrease" the "urgency it imports" (*id.* at 414). Accordingly, because the purpose of the Necessary and Proper Clause is to facilitate the exercise of Congress's enumerated powers, not to shackle Con-

gress in its choice of options, the Court held that a showing of strict necessity is not required and that the selection of suitable means is largely committed to Congress. (*id.* at 417-421). "Let the end be legitimate," the Court stated, and Congress may pursue "all means which are *appropriate*, which are plainly adopted to that end" (*id.* at 421 (emphasis added)). The word "exigency" is of the same character as the word "necessary" in the respects relevant here. Accordingly, because the Court in *Shively*, as in *McCulloch* v. *Maryland*, was considering a subject matter (the disposition of federal property) in which Congress's authority is exceedingly broad, the word "exigency" as used therein should he understood to be the equivalent of the "appropriate public purpose" standard stated elsewhere in the *Shively* opinion. See 17 U.S. (4 Wheat.) at 422. Especially in the present context, the language of *Shively* and its progeny does not authorize the courts to second-guess the wisdom of Congress's provision for the reservation of public lands for particular public purposes merely because the reservation happens to embrace lands underlying navigable waters.

But even if a more stringent standard were intimated by the Court, it plainly was satisfied here. As we have explained (see pages 24-25, 38-42, *supra*), Congress responded to what it perceived as an urgent and compelling need to prevent speculation, monopoly, and other impediments to the use of federal lands for irrigation purposes, as well as the need to maintain the lands under federal ownership and control pending future development of reservoir sites. Indeed, against this background, the court of appeals specifically held that "the withdrawal of Utah Lake, including its bed, was made for a public purpose motivated by *public exigency*, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a (emphasis added)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

STEVEN A. HERMAN
JACQUES B. GELIN
DIRK D. SNEL
Attorneys

FEBRUARY 1987

APPENDIX A

STATUTORY PROVISIONS INVOLVED

1. The Sundry Appropriations Act of October 2, 1888, ch. 1069, 25 Stat. 505, provided in relevant part (25 Stat. 526-527):

> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, * * * [there is appropriated] the sum of one hundred thousand dollars or so much thereof as may be necessary. And the Director of the Geological Survey under the supervision of the Secretary of the Interior shall make a report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoires [sic] and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after passage of this act, to entry, settlement or occupation until further provided by law:
>
> *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.[1]

---

[1] The proviso was repealed by Section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2792.

2. The Sundry Appropriations Act of August 30, 1890, ch. 837, 26 Stat. 371, provides in pertinent part (26 Stat. 391):

> [S]o much of the act of October second, eighteen hundred and eighty-eight, entitled "Any act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," * * * as provides for the withdrawal of the public lands from entry, occupation and settlement is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location of selection thereof.[2]

[2] The substance of the portion of the 1890 Act beginning with the word "except" is codified at 43 U.S.C. 662.

APPENDIX B

EXCERPTS FROM THE TWELFTH ANNUAL REPORT OF THE UNITED STATES GEOLOGICAL SURVEY

The Twelfth Annual Report of the United States Geological Survey, 4 (Pt. 2) H.R. Exec. Doc. 1 (Pt. 5), 51st Cong., 1st Sess. (1890)), provides in relevant part (at 336, 339):

> As the shores, excepting on the west side, are very low and with gentle slope toward the lake, the inclination in places being less that 4 feet to the mile, this variaiton of surfaces increases and diminishes the water area greatly, the shore advancing or retreating over a strip of land 1 to 2 miles or even more in width.
>
> * * * * *
>
> [T]he efficiency of the lake as a reservoir would be greatly increased if its area could be reduced even to less than half of its present extent; for by so doing in years of scarcity, as those of 1888 and 1889, a large proportion of the water which reaches the lake, instead of being lost by evaporation, would be retained and held for use in canals which cover the land of Salt Lake County. On the other hand, considering this question from a theoretical standpoint, if the lake were only one-half its present area, the floods which come in years of exceptional precipitation would cause a far greater proportional increase of water surface than now takes place, for this water, being thrown into a smaller lake and being able to escape but slowly through the Jordan River, would of necessity encroach upon a far greater proportion of the surrounding lands.
>
> Thus, while to obtain the maximum amount of water in years of scarcity it would be better if the lake were small, yet to take care of the floods, which will happen at intervals of from five to ten years,

it is necessary that the lake have a flood area as large as it now has, or even what it would have at the highest water. From consideration of these points the segregation of the land around and under the lake was made to a contour line which should be 5 feet above the low-water mark of 1879.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1907 101483 40208